Supreme Court, U. S.
FILED
OCT 1 1980
MICHAEL RODAK, JR., CLERK

No. 80-306

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN W. AND MARY C. COLEBANK,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The question presented in this federal income tax case is whether the decision below correctly held that negotiation by the Internal Revenue Service of a check submitted by petitioners with an offer in compromise of their income tax liability was not a binding acceptance of the offer.

The pertinent facts may be summarized as follows: After an audit of petitioners' 1972 federal income tax return, the Internal Revenue Service determined a liability of $2,896.83. Upon their receipt of a preliminary audit statement indicating a deficiency, petitioners promptly wrote to the Internal Revenue Service denying that they owed additional taxes, but offering to settle the dispute

for $500. A check for $500, marked "1972 Tax Audit paid in full," was enclosed (Pet. App. 2a).

Petitioners' check was negotiated by the Internal Revenue Service and credited to their account on August 22, 1974, in accordance with established procedure. *Colebank* v. *Commissioner*, 36 T.C.M. 200, 201 (1977). By letter dated September 24, 1974, the Internal Revenue Service notified petitioners that their settlement proposal was unacceptable and that their check had been applied as a deposit against their liability pending final settlement of the dispute. Petitioners were also advised to arrange a settlement conference with the Internal Revenue Service (Pet. App. 2a).

On January 6, 1975, the Internal Revenue Service mailed to petitioners a statutory notice of deficiency in accordance with Section 6212(a) of the Code. By letter dated March 10, 1975, petitioners requested that the statutory notice be withdrawn on the ground that the liability had been paid (Pet. App. 2a). The Internal Revenue Service responded on March 13, 1975, by explaining that negotiation of petitioners' check did not constitute an acceptance of their offer in compromise, and the Internal Revenue Service offered to return the $500 that had been credited to petitioners' account. Petitioners declined the Internal Revenue Service's offer to return the money. *Colebank* v. *Commissioner*, *supra*, 36 T.C.M. at 201.

In this action brought by petitioners in the Tax Court, petitioners did not contest the correctness of the deficiency. Their sole argument was that the Internal Revenue Service's negotiation of the check submitted with their offer constituted a binding settlement agreement. The Tax Court held that negotiation of petitioners' check

did not constitute an acceptance of their offer, and the court of appeals affirmed (Pet. App. 2a-3a).

1. The decision below correctly held that negotiation of petitioners' check by the Internal Revenue Service did not constitute a binding acceptance of petitioners' offer to compromise their federal income tax liability. Section 7122 of the Internal Revenue Code of 1954 (26 U.S.C.) provides that the Secretary of the Treasury or his delegate may compromise any civil case arising under the internal revenue laws. Offers in compromise must be submitted in writing and generally must be accompanied by a remittance representing the amount of the offer. Treasury Regulations on Procedure and Administration, Section 301.7122-1(d)(1) (26 C.F.R.). An offer in compromise is accepted only when the taxpayer is notified in writing. Treasury Regulations on Procedure and Administration, Section 301.7122-1(d)(3). The settlement of a disputed federal income tax claim is not binding unless there is rigid adherence to these requirements. *Royal Indemnity Co.* v. *United States*, 313 U.S. 289, 294-295 (1941); *Botany Worsted Mills* v. *United States*, 278 U.S. 282 (1929); *Country Gas Service, Inc.* v. *United States*, 405 F. 2d 147, 149-150 (1st Cir. 1969); *Brubaker* v. *United States*, 342 F. 2d 655, 662 (7th Cir. 1965).

The Internal Revenue Service fully complied with its established procedure in rejecting petitioners' offer in compromise. The check submitted with the offer was negotiated and credited to petitioners' account pending formal action on the offer. Petitioners were advised in writing when the offer was rejected. After petitioners failed to arrange a conference with the Internal Revenue Service to discuss the dispute, the Internal Revenue Service offered to return the payment. Petitioners declined the offer to return the $500 and the payment was

applied against their tax liability. *Colebank*, *supra*, 36 T.C.M. at 201.[1]

2. The courts below also properly rejected petitioners' common law accord and satisfaction argument. It is well established that the negotiation of a check submitted with a taxpayer's offer in compromise does not constitute an acceptance of that offer by the Internal Revenue Service because the above-cited requirements (which were not satisfied here) provide the exclusive method to compromise tax liabilities. *Rountree* v. *Commissioner*, 456 F. 2d 1110, 1111 (6th Cir. 1972); *Moskowitz* v. *United States*, 285 F. 2d 451, 453 (Ct. Cl. 1961); *Hughson* v. *United States*, 59 F. 2d 17, 19 (9th Cir.), cert. denied, 287 U.S. 630 (1932); *Bowling* v. *United States*, 32 A.F.T.R. 2d para. 73-5277, 5902 (N.D Tex. 1973), aff'd, 510 F. 2d 112 (5th Cir. 1975); *Parks* v. *Commissioner*, 33 T.C. 298, 302 (1959); *Scharton* v. *Commissioner*, 32 B.T.A. 459, 464 (1935); *Green* v. *Commissioner*, 26 B.T.A. 719, 726 (1932), appeal dismissed, 75 F. 2d 1014 (9th Cir. 1935); *Johnston* v. *Commissioner*, 19 B.T.A. 630 (1930).

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[1]Section 301.7122-1(d)(4) of the Treasury Regulations on Procedure and Administration provides that if an offer is rejected "the amount tendered with the offer * * * shall be refunded without interest," unless the taxpayer has agreed that the amount tendered may be applied to the liability with respect to which the offer was submitted. The Internal Revenue Service offered to return the payment made by petitioners, but they declined the offer. The court of appeals determined that the Internal Revenue Service's offer to return the payment was not timely, since it was made after petitioners' settlement offer was rejected (Pet. App. 3a). The court of appeals correctly held, however, that even if it is assumed that the Internal Revenue Service's attempt to return the payment was untimely, there is still no enforceable agreement (Pet. App. 3a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1980

DOJ-1980-09